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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ELLEN SCHALL, Commissioner of the New York City Department of Juvenile Justice, and ROBERT ABRAMS, Attorney General of the State of New York,

Appellants

v.

GREGORY MARTIN, *et al.*,

Appellees

On Appeals from the United States Court of Appeals for the Second Circuit

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BRIEF OF AMICUS CURIAE, PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF APPELLEES

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BRIEF OF AMICUS CURIAE, PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

The Public Defender Service for the District of Columbia offers this brief as amicus curiae in support of Appellees.

The Public Defender Service is an agency of the District of Columbia providing legal representation to indigent persons charged with crimes in the District. One section of the Service is devoted exclusively to representing juveniles. Each year the agency represents hundreds of juveniles charged with serious acts of delinquency.

The District of Columbia, along with other jurisdictions, has statutes and rules authorizing preventive detention of juveniles charged with delinquent acts. As is true in all other jurisdictions, there is no bail system for juveniles—they are either released or detained pending trial.

The Court's decision in the present case will have a significant impact on amicus and the hundreds of juvenile clients represented each year. The District of Columbia statute and rules provide some, but insufficient limits on judicial discretion in making detention decisions. The New York statute, however, is even a cruder tool for predicting future criminal activity. Reversal of the Second Circuit decision in this case would foreclose consideration of more sophisticated detention schemes, such as the one used in the District of Columbia.

Examination of the District of Columbia juvenile detention statute and rules puts in context the New York statute and makes clear its constitutional shortcomings. The Public Defender Service submits this brief to show that the New York preventive detention statute violates due process.

SUMMARY OF THE ARGUMENT

The New York juvenile preventive detention statute permits the pretrial detention of juveniles charged with acts of delinquency only on both a finding of probable cause and a finding that unless detained, there is a "serious risk" the juvenile would commit another crime before the next court hearing. This simplistic statute violates due process.

The liberty interests at stake in a detention hearing are fundamental. Yet in practice, a detention hearing is a hurried review of incomplete and inaccurate information regarding a child's home, school, employment and juvenile record. Moreover, predictive judgments of criminal activity are notoriously unreliable under the best of conditions.

Due process requires procedures that will reduce the unacceptably high risk of error in detention hearings. At a minimum, a preventive detention statute should provide criteria for detention decisions so that rulings are not made on whim or caprice; written notice of the allegations supporting detention, with some opportunity to prepare for the hearing and controvert the allegations; and a requirement that detention is permissible only if the judge finds by "clear and convincing evidence" that release would present a serious risk of additional crime. The New York statute provides none of these procedural safeguards, and thus violates due process.

ARGUMENT

THE NEW YORK JUVENILE PREVENTIVE DETENTION STATUTE VIOLATES DUE PROCESS BECAUSE IT PROVIDES INADEQUATE PROCEDURAL SAFEGUARDS IN DECIDING THE APPROPRIATENESS OF PRETRIAL DETENTION

Section 320.5(3) of the New York Family Court Act allows preventive detention of juveniles charged with delinquency so long as a judge makes two findings: (1) that there exists a "serious risk" that the juvenile will commit another offense while pending trial; and (2) that there is probable cause to believe the juvenile committed the present offense.[1] In making the first finding, the judge's discretion is completely unguided; he has no statutory standards or rules from which to decide whether a juvenile's release would present a "serious risk" of additional crime. Nor is the judge given the standard of proof required for a finding of "serious risk."

Other jurisdictions permit preventive detention of juveniles charged with acts of delinquency. The District of Columbia, for example, uses a combination of statutory

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[1] The second finding need not be made until the juvenile has been detained for five days.

provisions and court rules requiring a judge to make certain findings before he can order preventive detention. While the District of Columbia scheme is analogous to the New York statute in that it permits preventive detention of a juvenile based on a judge's finding that the juvenile will commit a crime if released, the finding is guided by certain factors that are deemed to be relevant.

The District of Columbia preventive detention scheme for juveniles is far from perfect. It raises many difficult questions regarding the constitutionality of preventive detention, including the sufficiency of the criteria and the process available, and the accuracy of predictions of future dangerousness based on scanty and often inaccurate information. The New York statute, however, is so far inferior to the District of Columbia framework that the constitutional questions are more easily answered: as presently designed, the New York preventive detention statute for juveniles violates due process.

In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the Supreme Court set forth the basic analytical framework for deciding whether governmental procedures are constitutionally sufficient:

> "our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

See also Santosky v. Kramer, 445 U.S. 745, 754-55 (1982). While *Mathews* involved the adequacy of governmental procedures for terminating Social Security disability benefits, the analysis is equally applicable to

governmental procedures for denying an individual his liberty.

There is no dispute that preventive detention of juveniles implicates important due process concerns. Whether or not preventive detention is characterized as punitive,[2]

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[2] In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court held that certain conditions of confinement, necessitated by the pretrial detention of adults who were unable to post bond, were not punitive. At the same time, the Court held that any form of punishment imposed before trial would, of course, be a denial of due process. Because it was not presented, the Court reserved decision as to whether or not detention to ensure community safety, as opposed to an accused's appearance at trial, was punitive or non-punitive in nature. *Id.* at 534 n.15.

In *Bell* the Court identified certain tests traditionally used in determining whether governmental action is punitive:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (footnotes omitted)."

Bell v. Wolfish, supra, 441 U.S. at 537-38.

Application of these tests strongly suggests that preventive detention is punitive in nature. Detention is an affirmative restraint, and incarceration for the purpose of protecting the community from criminal acts historically has been viewed as punishment. *Powell v. Texas*, 392 U.S. 514, 539 (1968) (Black, J., concurring). Preventive detention is based on a finding of *scienter* in that it requires a conclusion that the juvenile will willfully violate the law. Finally, incapacitation traditionally has been considered one of the aims of the penal system (the others being rehabilitation, retribution and general deterrence). *See United States v. Brown*, 381 U.S. 437, 458 (1965); *Specht v. Patterson*, 386 U.S. 605, 608-09 (1967).

These fundamental and troublesome issues need not be decided in the present case, however, because if *any* system of pretrial detention designed to ensure community safety could pass constitutional muster, it is not the New York statute.

the effect on the juvenile is as if he were being punished for a crime. A detained juvenile will lose his employment or be forced to leave school, suffer indignation and stigma, and be taken away from family and friends. Additionally, as various studies have concluded, a juvenile who is detained stands a greater chance of both being convicted and receiving a commitment to a juvenile institution following conviction. *See* Ares, Rankin and Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. Rev. 67, 86 (1963); Vera Institute of Justice, Programs in Criminal Justice Reform: Ten-Year Report 1961-1971, at 31 (1972). Thus, juveniles have a substantial interest in remaining free pending trial. Moreover, as the Court repeatedly has made clear, liberty—freedom from physical restraint—is fundamental in our constitutional scheme. In *Stack v. Boyle*, 342 U.S. 1, 4 (1952), the Court stated, in a slightly different context:

> "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." (citation omitted).

These concerns, which derive directly from the Bill of Rights, are illustrative of the fundamental interest in protecting the individual from the potential for injustice that lurks in the government's use of its massive power to enforce the law.

Even if the government has, under certain circumstances, a legitimate interest in using preventive detention to protect the community from juveniles who may commit crimes while on pretrial release, the government has an equally important interest in assuring that procedures are fair, and that detention decisions are based on

accurate findings.[3] And surely the government has no interest in the erroneous pretrial detention of juveniles.

In determining what process is due, it is not enough to identify the importance of the interests at stake; it is also necessary to gauge the risk of error in existing procedures. Preventive detention necessarily involves a substantial risk of error. Detention decisions require a predictive judgment regarding future conduct that is based on scanty, and often inaccurate information. Moreover, as study after study have concluded, predictions of future criminal behavior are extremely unreliable. The American Psychiatric Association, for example, has stated, "neither psychiatrists nor anyone else have reliably demonstrated an ability to predict future violence or 'dangerousness.'" American Psychiatric Association, Task Force Report on the Clinical Aspects of Violent Individuals 28 (1974). *See* Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U.Pa. L. Rev. 439 (1974); Rubin, *Prediction of Dangerousness in Mentally Ill Criminals*, 27 Arch. Gen. Psychiatry 397 (1972); Megaree, *The Prediction of Violence With Psychological Tests*, Speilberger, ed., Current Topics in Clinical and Community Psychology (1970). Moreover, juvenile detention decisions are made quickly, with only a cursory review of the information. There is no opportunity to verify or controvert the information relied on by the judge. Given the unreliable data base, and the inherent unreliability in predicting future dangerousness, it is hardly surprising that the risk of error in detention decisions is great. Under these circumstances—enormous risk of error and importance of the

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[3] The government also has an interest in ensuring that the juvenile appears for trial. *See Stack v. Boyle*, 342 U.S. 1, 4-5 (1951). That interest is addressed in both the New York and District of Columbia juvenile preventive detention laws. However, that provision was not challenged below, and its legitimacy as a basis for pretrial detention is not before the Court.

interests at stake—due process requires safeguards that will reduce the risk of error to acceptable levels.

The New York juvenile preventive detention statute affords no protections to reduce the risk that a juvenile will be detained erroneously pending trial. The New York statute states simply and simplistically that:

> "The court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained:
>
> . . .
>
> (b) there is a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime." Section 320.5(3), New York Family Court Act.

As is apparent, the statute makes no provision (1) for criteria to guide a judge's detention decision; (2) for notice of the allegations on which the government is relying in seeking detention; (3) for the standard of proof by which a judge must conclude that release would pose a "serious risk" of additional crime. The absence of any one of these factors leaves the New York statute constitutionally deficient.

The New York statute violates due process because it provides utterly no basis for a judge to make a detention decision. Each exercise of judicial discretion, in making a notoriously unreliable prediction of future criminal behavior, is without legislative guidance or limits, and is thus effectively unreviewable. Absent any legislatively recognized criteria for predicting recidivism, a juvenile court judge in New York is free to make detention decisions on whim. The result is inconsistent and conflicting detention decisions; factors that one judge may feel create a serious risk of crime may make no impression on another judge.

The preventive detention statute need not be so broadly constructed. For example, in the District of Columbia,

judges are guided by specific factors deemed relevant in making the detention decision. The basic statutory provision for detaining juveniles charged with delinquency is found in 16 D.C. Code § 2310(a):

> "(a) A child shall not be placed in detention prior to a factfinding hearing [a trial] or a dispositional hearing [a sentencing hearing] unless he is alleged to be delinquent . . . and unless it appears from available information that detention is required—
>
> (1) to protect the person or property of others or of the child, or
>
> (2) to secure the child's presence at the next court hearing."

A finding that detention is necessary for any one of these four criteria is sufficient to detain the child.[4]

The District of Columbia statute provides that these basic criteria are to be implemented by the Superior Court Rules. 16 D.C. Code § 2310(c). Rule 106(a) separately addresses each of the four criteria listed in section 2310(a), setting forth "factors" to be considered by a judge before he can find detention to be "necessary." Rule 106(a)(1) deems relevant six factors in deciding whether detention is "necessary" to protect other persons:

> "(i) Record of child's previous offenses against persons,

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[4] Three of the four statutory criteria address the two criteria listed in the New York statute. The first two criteria—protection for either the persons or property of others—are roughly analogous to the New York criterion of "serious risk" of criminal activity before trial. The fourth criterion—securing the juvenile's presence at the next hearing—is similar to the first criterion under the New York statute. The remaining criterion—protecting the child—is not addressed by the New York detention statute. In practice, this criterion is rarely used by the District of Columbia Superior Court in deciding to detain a juvenile.

(ii) Record of child's previous weapons offenses,

(iii) Nature and circumstances of the pending charge,

(iv) Nature and circumstances of other pending charges, if they involve an offense against the person or a weapons offense,

(v) Allegations of danger or threats to witnesses, and

(vi) Emotional character and mental condition of the child."

Rule 106(a)(2) lists three factors in deciding whether detention is "necessary" to protect the property of others from "serious loss or damage":

"(i) Record of child's previous offenses against the property of others, if serious loss or damage was involved,

(ii) Nature and circumstances of the pending charge, and

(iii) Nature and circumstances of other pending charges, if they involve serious loss or damage to the property of others." [5]

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[5] The other two statutory criteria, protection of the juvenile himself and ensuring his presence at the next hearing, do not involve predictions of future criminal activity. Rule 106(a)(3) refers to four factors in protecting the child:

"(i) Narcotics addiction by child or other severe and chronic drug abuse,

(ii) Severe and chronic alcoholism of the child,

(iii) Suicidal actions or tendencies of the child, and

(iv) Other seriously self-destructive behavior creating an imminent danger to the child's life or health."

Rule 106(a)(4) lists seven factors in determining whether detention is "necessary" to ensure the child's presence at the next hearing:

"(i) Child's residence in the District of Columbia,

(ii) Length of child's residence and present community ties,

[Footnote continued on page 11]

As Rule 106(a) illustrates, a judge in the District of Columbia is guided by numerous, specific factors in deciding whether detention is "necessary." Rule 106 identifies as relevant the nature and circumstances of the present charge; the nature and circumstances of pending charges that involve either "serious loss [of] or damage" to property, weapons, or crimes against persons; the juvenile's record of convictions that involve "serious loss [of] or damage" to property, weapons, or crimes against persons; allegations of threats to witnesses; and the emotional and mental condition of the child. In the District of Columbia, unlike in New York, a court may not detain an alleged child on mere whim.[6]

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[5] [Continued]

(iii) Employment record of the child,

(iv) Record of child's appearances at prior court hearings and circumstances surrounding non-appearances, if any,

(v) Record of child's previous abscondances from institutions or official custody, and circumstances surrounding such abscondances,

(vi) Record of child's abscondances from home, and circumstances surrounding such abscondances and the child's eventual return home, and

(vii) Seriousness of the pending charge and its likelihood of inducing non-appearance."

[6] The enormous breadth of the New York statute is made manifest when one considers that it permits pretrial detention regardless of the present or past offenses, and regardless of the crime the child may commit before his trial. Thus, a judge in New York could detain a juvenile for a minor property crime if he concluded, based on the child's failure to hold a job, that there was a serious risk of future petty crime.

While the District of Columbia statute and rules do not list "detainable" crimes, there are some guidelines. Rule 106(a)(2) permits detention only when "necessary" to protect property from "serious loss or damage." In deciding whether future crimes may involve serious loss or damage, a judge can consider both the past record of property offenses and pending offenses, but only if they involve serious loss or damage.

Quite apart from legislative guidance for predicting criminal activity, neither the New York nor the District of Columbia preventive detention laws make any provision for written notice to the juvenile and his attorney of the allegations to be presented to the court for its detention decision. Such information is often unreliable and incomplete, gathered as it is only shortly before the court hearing and based on a cursory check of files or hurried interviews with the juvenile and his family. Because this information will be the basis for the court's decision to detain the juvenile, due process requires notice of the allegations, and an opportunity to controvert them.

Written notice has long been recognized as an essential component of due process. For example, prisoners facing disciplinary proceedings, *Wolff v. McDonnell*, 418 U.S. 539, 563-64 (1974), probationers facing revocation, *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973), and parolees facing revocation, *Morrissey v. Brewer*, 408 U.S. 471, 486-87 (1972), are entitled to receive notice of the charges and facts alleged against them. It is inconceivable that a potential detainee, whose legally cognizable liberty interests are much greater than either those of a prisoner or the conditional liberty of a parolee or probationer, should not receive at least as much notice. "*A fortiori*, pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners." *Bell v. Wolfish*, *supra*, 441 U.S. at 545.

Notice need not be a matter of days; generally, it would be sufficient, for purposes of checking the allegations and preparing for a hearing, if an attorney had a couple of hours. And each jurisdiction could create standard forms for listing the information to be presented at a detention hearing. It is difficult to believe that this sort of "bare bones" notice would pose any burden on the government, or that the government would have any legitimate interest in opposing release of that information two hours before a detention hearing.

Notice of and the opportunity to controvert allegations at the detention hearing are meaningless, however, if there is no standard of proof for the court's ruling. Neither the New York nor the District of Columbia juvenile detention statutes sets forth the standard of proof required in finding that release would pose a "serious risk" of crime (New York) or that detention is "necessary" to protect the persons or property of others (District of Columbia). This standardless discretion violates due process.

The standard of proof is a device "to allocate the risk of error between litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979). *See also Santosky v. Kramer*, *supra*, 455 U.S. at 755. Thus, in most private civil damage suits, where "society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence." *Addington v. Texas*, 441 U.S. at 423. In criminal cases, on the other hand, "the interests of the defendant are of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Id.*

As noted above, preventive detention for juveniles is in many ways indistinguishable from incarceration following trial. In fact, as the findings of the lower courts made clear, for most juveniles, the pretrial incarceration was the *only* period of incarceration. Moreover, each detention decision is an enormously risky venture. No one can gainsay that the risk of error is high.

Under these circumstances, due process requires that the government, not the individual, bear a greater share of the risk of error by proving, at a minimum, by clear and convincing evidence that detention is required. Certainly, the state has a significant interest in protecting the community, and perhaps even a *parens patriae* interest in ensuring that the child does not harm himself by becoming further involved in criminal activity. Neverthe-

less, the individual juvenile's interest in avoiding pretrial incarceration and its collateral consequences, as well as the tremendous risk inherent in this sort of predictive judgment, require the state to adopt no less a standard of proof than that constitutionally required in civil commitment proceedings. *See Addington v. Texas, supra.* As this Court recently stated, "This Court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Santosky v. Kramer, supra,* 455 U.S. at 756.

In many respects, the predictive judgment made by a judge in a preventive detention hearing is identical to the finding of "dangerousness" required in civil commitment proceedings. Both rely on data provided and interpreted by professionals (social workers in one case and psychiatrists in the other). Moreover, neither hearing is strictly a criminal proceeding, for in neither does the individual suffer the full stigma of a criminal conviction. And in both cases, a standard of beyond a reasonable doubt could defeat the government's interests since, given the uncertainty of such predictive judgments, the government would find it difficult to prove future dangerousness. *Addington v. Texas, supra,* 441 U.S. at 479.

The standard for arrest, and for parole and probation revocation, illustrate the importance of a clear and convincing standard for preventive detention. Probable cause, which permits a relatively high margin of error, is the standard for arrest because the deprivation of liberty is relatively small. Similarly, parole and probation violators, who have only conditional liberty, can be incarcerated on proof of only a preponderance of the evidence that they violated their conditions of release. By contrast, the juvenile's stake is higher—preventive detention is a significantly greater deprivation of liberty than arrest, and the potential detainee's liberty interest is substan-

tially greater than that afforded a parolee or probationer. Accordingly, at a minimum, the government must prove, by clear and convincing evidence every finding necessary for preventive detention.

CONCLUSION

For the foregoing reasons, the Amicus Curiae, the Public Defender Service for the District of Columbia, submits that the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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